

MONTANA FIRST JUDICIAL DISTRICT, LEWIS & CLARK COUNTY

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STATE OF MONTANA, ex rel.	)	
DEPARTMENT OF ENVIRONMENTAL	)	
QUALITY,	)	Cause No. BDV-2004-596
Plaintiff,	)	
	)	PARTIAL CONSENT DECREE
-vs-	)	
	)	
THE BURLINGTON NORTHERN AND	)	
SANTA FE RAILWAY CORPORATION,	)	
EXXON MOBIL CORPORATION,	)	
KALISPELL POLE AND TIMBER	)	
COMPANY, KLINGLER LUMBER	)	
COMPANY, INCORPORATED,	)	
MONTANA DEPARTMENT OF	)	
NATURAL RESOURCES AND	)	
CONSERVATION, MONTANA MOKKO,	)	
INCORPORATED, SWANK	)	
ENTERPRISES, and DOES 1 to 100,	)	
	)	
Defendants.	)	

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**I. BACKGROUND**

1. The Montana Department of Environmental Quality (DEQ) filed a complaint in this matter on August 6, 2004, pursuant to Mont. Code Ann. § 75-10-701, et seq. DEQ named as defendants The Burlington Northern and Santa Fe Railway Company, Exxon Mobil Corporation, Kalispell Pole and Timber Company, Klingler Lumber Company, Incorporated, the Montana Department of Natural Resources and Conservation, Montana Mokko, Incorporated, and Swank Enterprises (Swank).

2. DEQ filed an amended complaint in this matter on September 24, 2004, against the same Defendants.

3. In its amended complaint, DEQ seeks (1) to abate an imminent and substantial endangerment to the public health, safety, and welfare and the environment; (2) recovery of

remedial action costs incurred and to be incurred by DEQ in connection with the Kalispell Pole and Timber (KPT), Reliance Refinery, and Yale Oil Refinery state Superfund facilities (the Facilities); (3) a declaratory judgment to establish the Defendants' liability for all future cleanup costs that DEQ will incur in connection with these facilities; and (4) penalties from some of the Defendants pursuant to the Montana Comprehensive Environmental Cleanup and Responsibility Act (CECRA).

4. The KPT facility is located in the City of Kalispell in Flathead County, within the NW¼ of Section 8, Township 28 North, Range 21 West. The historic KPT property boundaries encompass approximately 35 acres.

5. The KPT property was used for pole de-barking, timber milling, and pole treatment from approximately 1947 to 1990 when Kalispell Pole and Timber Company (KPT Company) discontinued those operations. DEQ alleges that these operations have resulted in the release or threatened release of pentachlorophenol (PCP), dioxin, petroleum hydrocarbons, and other hazardous or deleterious substances into the environment.

6. The Reliance Refinery facility is located east of the KPT property. The historic Reliance Refinery property boundaries consist of approximately seven acres. The Reliance Refinery property was used as a refinery and cracking plant from the 1920s through about 1958. The property was leased to the KPT Company from 1969 to 1994. DEQ alleges that these operations have resulted in the release or threatened release of petroleum hydrocarbons and other hazardous or deleterious substances into the environment.

7. The Yale Oil facility is located south/southeast of the Reliance Refinery property. The historic Yale Oil property boundaries consist of approximately four acres. The Yale Oil property was used as a refinery beginning in the 1930s and was used as a bulk fuel storage

facility from sometime in the 1940s until about 1978. DEQ alleges that these operations have resulted in the release or threatened release of petroleum hydrocarbons and other hazardous or deleterious substances into the environment.

8. DEQ alleges that contamination from the KPT facility has co-mingled with contamination from the Reliance Refinery and Yale Oil facilities in the groundwater.

9. In response to the release or threatened release of hazardous or deleterious substances at or from the Facilities, DEQ undertook remedial actions and incurred remedial action costs, and will continue to undertake remedial actions and incur remedial action costs at the Facilities pursuant to CECRA.

10. Mont. Code Ann. § 75-10-701(4)(ii) of CECRA defines a “facility” to include “any site or area where a hazardous or deleterious substance has been deposited, stored, disposed of, placed, or otherwise come to be located.”

11. Mont. Code Ann. § 75-10-701(8) of CECRA defines “hazardous or deleterious substances” and based on that definition DEQ considers hazardous or deleterious substances to include PCP, dioxin, and petroleum hydrocarbons.

12. Mont. Code Ann. § 75-10-715 of CECRA provides that “the following persons are jointly and severally liable for a release or threatened release of a hazardous or deleterious substance from a facility: (a) a person who owns or operates a facility where a hazardous or deleterious substance was disposed of; (b) a person who at the time of disposal of a hazardous or deleterious substance owned or operated a facility where the hazardous or deleterious substance was disposed of....” Mont. Code Ann § 75-10715(5)(b) & (c)(i) provide defenses to that liability.

13. DEQ has notified Swank and alleges that Swank is potentially jointly and severally liable for remediation of the KPT and Reliance Refinery facilities. DEQ alleges Swank also has liability for the Yale Oil facility. In response Swank alleges the following:

On June 1, 1990 Swank acquired certain real property located in Flathead County, Montana. Said real property is more fully described in the deed of record in the office of the Flathead County Clerk and Recorder as document 90152/6260. On March 2, 1992 Swank sold some of said real property to Klingler Lumber Company pursuant to an unrecorded deed retaining only Tract 30Z of said real property. The property description of Tract 30 Z, the property currently owned by Swank, is set forth as follows:

Tract 30Z (Parcel 2)

A tract, piece or parcel of land, lying and being in the Northwest Quarter of the Northeast Quarter (NW1/4NE1/4), Section Eight (8), Township Twenty-eight (28) North, Range Twenty-one (21) West, P.M.M., Flathead County, Montana, and more particularly described as follows wit: Commencing at the North one quarter corner of Section 8, Township 28 North, Range 21 West, P.M.M., Flathead County, Montana; thence East and along the North boundary line of Section 8, 390.0 feet to a point; thence South 0°10' East, a distance of 20.0 feet to the True Point of Beginning of the tract of land being described; thence South 0°10' East, continuing along same line which is parallel with the mid-section line of Section 8, 325.0 feet to a point on the Northerly R/W of a Great Northern spur line R/W; thence North 74°00' East, and following along said G.N. R/W 136.0 feet to a point which is the beginning of a 7°23' curve; thence along the 7°23' curve, 497.7 feet to a point on the Westerly R/W of the Great Northern main line; thence North 18°21' East, and along the Westerly Great Northern R/W. 25.0 feet to a point on the South boundary of a 20.0 foot county road; thence West and along said county road boundary, 553.2 feet to the Place of Beginning of the tract of land being described.

Swank alleges that it had not at any time prior to acquisition of said property and has not since conducted any pole treatment or refinery operations on the Swank property and to the best of Swank's knowledge, information, and belief no pole treatment operations were ever conducted on that area encompassed within the Swank property.

14. DEQ and Swank desire to resolve Swank's alleged liability for past and future remedial action costs without the admission or adjudication of any issue of fact or law. The Parties recognize, and the Court by entering this Consent Decree finds, that the Parties have negotiated this Consent Decree in good faith, that implementation of the Consent Decree will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair and reasonable and is in the public interest. Entry of this Decree shall not be construed to be an acknowledgement by Swank that any release or threatened release has occurred or that an imminent and substantial endangerment to the public health, safety, welfare or the environment exists at the site or that Swank has any liability with respect to the facilities.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

## **II. JURISDICTION**

15. This Court has jurisdiction over the subject matter of this action pursuant to Mont. Code Ann. § 75-10-711. This Court also has personal jurisdiction over the Parties. Solely for the purposes of this Consent Decree and the underlying complaints, the Parties waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. The Parties shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## **III. PARTIES BOUND**

16. This Agreement shall be binding upon DEQ and Swank and their successors and assigns. Any change in ownership or corporate or other legal status of either party, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she

is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

#### **IV. DEFINITIONS**

17. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CECRA shall have the meaning assigned to them in CECRA. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

- a. "CECRA" shall mean the Comprehensive Environmental Cleanup and Responsibility Act, Mont. Code Ann. §§ 75-10-701, et seq.
- b. "Consent Decree" shall mean this Partial Consent Decree and any attached appendices. This Consent Decree is "partial" in that it does not apply to every defendant in this case.
- c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- d. "DEQ" shall mean the Montana Department of Environmental Quality and any successor departments or agencies of the State of Montana.
- e. "Facilities" shall mean the sites designated by DEQ as the Kalispell Pole and Timber, Reliance Refinery, and Yale Oil Kalispell facilities that includes any site or area where contamination has come to be located. These facilities are depicted more particularly on Appendix "A".
- f. "Future Remedial Action Costs" shall mean all costs, including but not limited to direct and indirect remedial action costs, attorney's fees, and litigation costs, that DEQ or the

State of Montana on behalf of DEQ will incur at or in connection with the Facilities on or after July 1, 2005. It also includes all remedial action costs incurred by any person for remedial actions approved by DEQ at the Facilities. The Parties acknowledge that Senate Bill 489 enacted by the 2005 Montana Legislature provided \$1.25 million for the investigation and remediation of the Facilities and that Senate Bill 489 prohibits cost recovery of those funds by DEQ but requires that those funds be credited to any liability the state of Montana may have for the Future Remedial Action Costs.

g. "Institutional Controls" shall mean those non-engineering mechanisms specified as institutional controls in the Record of Decision for the Facilities. Institutional controls are designed to limit human activities at or near the Facilities while remedial actions are taking place or while contamination remains on or about the Facilities at levels above which DEQ deems appropriate to allow for unrestricted use of the Facilities.

h. "Interest" shall mean interest at the rate specified for interest at Mont. Code Ann. 31-1-106.

i. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or an upper or lower case letter.

j. "Parties" shall mean DEQ and Swank.

k. "Past Remedial Action Costs" shall mean all costs, including but not limited to direct and indirect remedial action costs, attorney's fees, and litigation costs, that DEQ or the State of Montana on behalf of DEQ has paid at or in connection with the Facilities through June 30, 2005 plus accrued Interest on all such costs through that date. Past Remedial Action Costs shall not include amounts previously spent by Swank or any third party in connection with the Facilities.

l. "Record of Decision" shall mean the DEQ Record of Decision, including all attachments, relating to the Facilities signed by the DEQ Director or his delegee.

m. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

n. "Swank Enterprises" shall mean Swank Enterprises, a Montana corporation.

## **V. REIMBURSEMENT OF REMEDIAL ACTION COSTS**

18. Within thirty (30) days of the effective date of this Consent Decree, Swank shall pay to DEQ the amount of Eleven Thousand Three Hundred Nineteen Dollars and Eighty-six cents (\$11,319.79). This payment serves as Swank's full and final reimbursement of Past Remedial Action Costs, including accrued Interest, if any, on that amount calculated from the date set forth in the definition of Past Remedial Action Costs through the date of payment. This payment may be made via a certified or cashier's check. The transmittal letter accompanying payment shall specify that the payment is to be applied to the Reliance Refinery facility, org. unit 483759.

Delivery shall be made to the following address:

Montana Department of Environmental Quality  
Fiscal Services Division  
PO Box 200901  
Helena, MT 59620-0901

19. At the time of any payment, Swank shall send notice that such payment has been made to:

Cynthia D. Brooks  
Legal Counsel  
Montana Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

20. Swank further agrees to pay two percent (2%) of all Future Remedial Action Costs at the Facilities until such time as all required remedial actions at the Facilities are complete and the Facilities are removed from the CECRA Priority List. When DEQ or any other person incurs



Future Remedial Action Costs, DEQ shall provide Swank with written notice of the amount and purpose of the remedial action costs. Within thirty (30) days of that notice, Swank shall pay to DEQ two percent (2%) of the total amount of the noticed Future Remedial Action Costs. The payment for any Future Remedial Action Costs incurred by DEQ shall be deposited by DEQ into the Environmental Quality Protection Fund. Any Swank payments representing Future Remedial Action Costs incurred by other persons shall, in DEQ's sole discretion, be either reimbursed to the person who incurred those Future Remedial Action Costs or retained by the DEQ to defer additional Future Remedial Action Costs, including DEQ's own Future Remedial Action Costs, or a combination of the two. It is agreed that any person may petition this court for enforcement of Swank's obligations under this Consent Decree. In the event that Swank believes that DEQ's portion of the Future Remedial Action Costs are excessive and unwarranted, Swank must give written notice specifying the disputed costs and reasons therefore to DEQ within ten (10) days of DEQ's notice. The Parties shall make a good faith effort to resolve the dispute. If the Parties are unable to resolve the dispute within ten (10) days of the date DEQ receives Swank's notice of dispute, Swank may, within ten (10) days, seek the intervention of this Court to determine the issue of DEQ's excessive and unwarranted charges. If Swank does not seek the intervention of the Court within this time period, Swank's objection is deemed unfounded and Swank will pay DEQ the disputed costs within five (5) days.

21. Swank is not allowed to involve DEQ in any dispute involving Future Remedial Action Costs incurred by any person for remedial actions approved by DEQ at the Facilities. However, Swank reserves the right to petition this Court to review any Future Remedial Action Costs incurred by a third party if Swank believes they are excessive and unwarranted. Swank shall not involve DEQ in any dispute involving third party costs, including but not limited to

those costs incurred by a third party conducting DEQ-approved remedial actions, except Swank may subpoena DEQ witnesses or documents under the Montana Rules of Civil Procedure. The Court may, in its discretion, award reasonable costs and attorney's fees to the prevailing party.

## **VI. FAILURE TO COMPLY WITH AGREEMENT**

22. In the event that any payments required by Paragraphs 18 and 20 are not made when due, Interest shall continue to accrue on the unpaid balance through the date of payment.

23. If any amount due to DEQ under Paragraph 18 is not paid by the required date, Swank shall pay to DEQ, as a stipulated penalty, in addition to Interest, \$1,000 per violation per Day that such payment is late. If any amounts due to DEQ under Paragraph 20 are not made within thirty (30) days of the required date, Swank shall pay to DEQ, as a stipulated penalty, in addition to Interest, \$1,000 per violation per Day that such payment is late. Furthermore, if any amounts due to DEQ by Swank under Paragraphs 18 and 20 are not paid by the required dates, DEQ shall no longer be bound by the covenant not to sue contained paragraph 28 and may withdraw the contribution protection provided to Swank in this Consent Decree. In the event that DEQ is no longer bound by the covenant not to sue provided in paragraph 28, Swank agrees that in any future legal or regulatory determination, its proportion of the liability for the Future Remedial Action Costs shall be not less than two percent (2%). If, however, Swank invokes the dispute resolution procedures set forth in Paragraph 20, payments shall not be due until ten (10) days after (1) the parties resolve the dispute; or (2) this Court issues a written determination regarding the disputed Future Remedial Action Costs. Penalties shall not be deemed to accrue until the issue is resolved unless the Court determines that Swank's objections were not made in good faith. Interest will continue to accrue during the dispute resolution process. During the pendency of the dispute, DEQ remains bound by its covenant not to sue and to its grant of

contribution protection until the issue is resolved. Failure of Swank to pay within ten (10) days of resolution of the issue shall be considered a default by Swank of this Consent Decree.

24. Stipulated penalties are due and payable within thirty (30) days of the date of demand for payment of the penalties. All payments to DEQ under this Paragraph shall be identified as "stipulated penalties" and shall be made in accordance with Paragraphs 18 and 19.

25. Penalties shall begin to accrue on the Day DEQ provides notice to Swank of the violation and shall continue to accrue through the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Decree.

26. If DEQ brings an action to enforce this Decree, Swank shall reimburse DEQ for all costs of such action, including but not limited to attorney's fees.

27. Notwithstanding any other provision of this Section, DEQ may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Decree.

## **VII. COVENANT NOT TO SUE BY DEQ**

28. In consideration of the actions that will be performed and the payments that will be made by Swank under the terms of the Consent Decree, and except as specifically provided in Paragraphs 23 and 29 of this Consent Decree, pursuant to Mont. Code Ann. § 75-10-719, Swank shall have contribution protection from third parties and DEQ covenants not to sue Swank for Past and Future Remedial Action Costs at the Facilities. DEQ's covenant not to sue is conditioned upon the satisfactory performance by Swank of its obligations under this Consent Decree. DEQ's covenant not to sue extends only to Swank and does not extend to any other person.

## **VIII. RESERVATIONS OF RIGHTS BY DEQ**

29. The covenant not to sue by DEQ set forth in Paragraph 28 does not pertain to any matters other than those expressly identified therein. DEQ reserves, and this Consent Decree is without prejudice to, all rights against Swank with respect to all other matters, including but not limited to the following:

- a. claims based on a failure of Swank to meet a requirement of this Consent Decree;
- b. liability arising from the past, present, or future disposal, release, or threat of release at any site or facility, other than the Facilities described herein;
- c. criminal liability;
- d. liability for actions which violate state or federal law, other than CECRA, and which occur during or after implementation of the remedial actions;
- e. liability for releases at the Facilities that occur after the effective date of this Consent Decree; and
- f. future liability for injunctive relief or administrative order enforcement under Title 75, Chapter 10, Part 7 of the Montana Code Annotated.

30. Nothing in this Consent Decree is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the State of Montana may have against any person, firm, corporation or other entity not a signatory to this Consent Decree.

31. Within ten (10) days after the Court signs this Order, DEQ shall dismiss with prejudice any and all of its claims and those assigned to it relating to the Facilities asserted against Swank, subject to the Court's retention of jurisdiction over this Consent Decree and the Parties provided in Section XVIII.

## **IX. COVENANT NOT TO SUE BY SWANK**

32. Swank covenants not to sue and agrees not to assert any claims or causes of action against DEQ or its contractors or employees with respect to Past or Future Remedial Action Costs or this Consent Decree, including but not limited to:

- a. any claim against DEQ related in any manner to the Facilities; and
- b. any claims arising out of remedial actions at the Facilities, including claims based on DEQ's selection of remedial actions, oversight of remedial actions, or acceptance of plans for such actions. Swank's covenant not to sue shall take effect upon approval of this Consent Decree by the Court. During the period of time between signature of this Consent Decree by the Parties and approval by the Court, Swank agrees to file no claims against DEQ and its representatives or contractors. Should the Court approve this Consent Decree, Swank's covenant not to sue DEQ becomes final. Should the Court fail to approve this Consent Decree, Swank is released from its covenant not to sue.

## **X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

33. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. DEQ and Swank each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Facilities against any person not a Party hereto.

34. DEQ and Swank agree that the actions undertaken by Swank in accordance with this Consent Decree do not constitute an admission of any liability by Swank. Swank does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to

implement or enforce this Consent Decree, the validity of the facts or allegations contained in Section I of this Consent Decree.

35. The Parties agree, and by entering this Consent Decree this Court finds, that Swank is entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by Mont. Code Ann. § 75-10-719, MCA, for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are Past Remedial Action Costs, Future Remedial Action Costs for the Facilities and remedial action costs incurred by other parties prior to the effective date of this Consent Decree.

36. In any subsequent administrative or judicial proceeding initiated by DEQ, or by the State of Montana on behalf of DEQ, for injunctive relief, recovery of remedial action costs, or other appropriate relief relating to the Facilities, Swank shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by DEQ set forth in Paragraph 28.

## **XI. FACILITY ACCESS**

37. Commencing upon the date the Parties execute this Consent Decree, Swank agrees to provide DEQ and its representatives, contractors, and all representatives and contractors of any person conducting remedial actions approved by DEQ at the Facilities, access at all reasonable times to the real property owned or controlled by Swank. The purposes of such access may include, but not be limited to, sampling, excavation, or any other physical imposition on the property needed to implement the remedy.

38. Notwithstanding any provision of this Consent Decree, DEQ retains all of its access authorities and rights, including related enforcement authorities, under CECRA and any other applicable statutes or regulations.

## **XII. INSTITUTIONAL CONTROLS**

39. Swank acknowledges that Institutional Controls may be necessary as part of selecting and implementing final or interim remedies for the Facilities. Upon issuance of the Record of Decision for the Facilities, DEQ will specify those Institutional Controls, if any, which will apply to the property owned or controlled by Swank. Swank agrees to use its best efforts to implement, maintain, and comply with each Institutional Control specified by DEQ for the Facilities in the future.

## **XIII. CONVEYANCE OF PROPERTY**

40. The restrictions and obligations of Swank with respect to the provision of access under Section XI and the implementation, maintenance, and compliance of Institutional Controls under Section XII are for the benefit of the Facilities and shall be considered covenants that run with the land and shall be binding upon Swank and upon any and all persons who acquire any interest in all or any portion of the property.

41. Swank agrees that it will not convey any portion of its real property interests in or control over the Reliance Refinery facility until such time as all required remedial actions at the Facilities are complete and the Facilities are removed from the CECRA Priority List unless DEQ provides written approval of the conveyance. For purposes of this Consent Decree, a conveyance includes the sale or lease of any portion of Swank's property. In order to receive the DEQ approval referenced herein, Swank agrees to provide DEQ at least sixty (60) days advance notice of the proposed conveyance. Such advance notice must include the name and address of

the grantee and the date on which notice of this Consent Decree and its obligations was given to the grantee. In the event of any conveyance, Swank's obligations under this Consent Decree, including its obligation to provide or secure access pursuant to Section XI and to implement, maintain, and comply with Institutional Controls under Section XII, shall continue to be met by Swank unless fully assumed in writing by the grantee and such written assumption is approved by DEQ at least twenty (20) days prior to the conveyance. In no event shall any conveyance of any interest in the property release or otherwise affect the liability of Swank to comply with this Consent Decree.

42. Within fifteen (15) days after the entry of this Partial Consent Decree, Swank shall execute and record at the Flathead County Clerk and Recorder's Office a "Notice of Obligation" in the form attached as Appendix "B", to provide notice of the access covenants under Section XI and the Institutional Controls under Section XII. Each subsequent instrument conveying an interest in any such property included in the Facility shall reference the recorded location of such notice and covenants applicable to the Facility.

43. At any time after the Court approves this Partial Consent Decree, DEQ may record either a certified copy of this decree or a notice of the entry of this Consent Decree with the Clerk and Recorder's Office for Flathead County, Montana.

#### **XIV. RETENTION OF RECORDS/ACCESS TO INFORMATION**

44. Until twenty (20) years after the effective date of this Consent Decree, Swank shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate in any manner to remedial actions taken at the Facilities or to the liability of any person for remedial actions conducted and to be conducted at the Facilities, regardless of any record retention policy to the contrary. Swank agrees to provide



DEQ access to the records at all times the records are in Swank's possession or control. Swank also agrees to freely share with DEQ any information Swank may possess which would facilitate DEQ's determination of final remedial alternatives.

45. After the conclusion of the document retention period in the preceding paragraph, Swank shall notify DEQ at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by DEQ, Swank shall deliver any such records or documents to DEQ. Swank may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by state law. If Swank asserts such a privilege, it shall provide DEQ with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of this or any other judicial or administrative settlement with DEQ shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to DEQ in redacted form to mask the privileged information only. Swank shall retain all records and documents that it claims to be privileged until DEQ has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Swank's favor.

46. By signing this Consent Decree, Swank certifies that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to DEQ, all information currently in its possession, or in the possession

of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation or control of the Facilities, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in connection with the Facilities;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Facilities, after notification of potential liability or the filing of a suit against Swank regarding the Facilities; and

c. fully complied with any and all DEQ requests for information regarding the Facilities.

47. As a condition to DEQ's agreement to enter into this Consent Decree, Swank covenants and agrees that it will not communicate in any way or otherwise provide information relating to the Facilities to any other party to this action without first providing DEQ's attorneys the opportunity to be present during such communications or to review any requested written information before transmitting it to any other party to this action. Swank further agrees that it will not object to DEQ's selection of remedial actions, oversight of remedial actions, or acceptance of plans for such actions.

## **XV. NOTICES AND SUBMISSIONS**

48. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Consent Decree with respect to DEQ and Swank.

As to DEQ:

Cynthia D. Brooks  
Legal Counsel  
Montana DEQ  
P.O. Box 200901  
Helena, MT 59620-0901

As to Swank:

Dean Swank  
President  
Swank Enterprises  
P.O. Box 568  
Valier, MT 59486

## **XVI. INTEGRATION/APPENDICES**

49. This Consent Decree and its appendix constitute the final, complete and exclusive agreement and understanding between DEQ and Swank with respect to the settlement embodied in this Consent Decree. Swank and DEQ acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. However, Swank agrees to abide by DEQ's future Record of Decision issued for these Facilities. [The following appendices are attached to and incorporated into this Agreement: Appendix "A" is general map of the Facilities and Appendix "B" is a Notice of Obligation.]

## **XVII. EFFECTIVE DATE**

50. The effective date of this Consent Decree shall be the date upon which the Court enters this Consent Decree, except as otherwise provided herein.

## **XVIII. RETENTION OF JURISDICTION**

51. This Court or its successor retains jurisdiction over both the subject matter of this Consent Decree and the Parties for the duration of the performance of the terms and provisions

of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms.

#### **XIX. MODIFICATION**

52. Except as otherwise provided in this Section, no modifications shall be made to provisions of this Consent Decree without written notification to and written acceptance by DEQ and Swank. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise, or modify this Consent Decree upon the motion of a Party.

#### **XX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

53. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment. DEQ may modify or withdraw its consent to this Consent Decree if comments received disclose facts or considerations that indicate that this Consent Decree is inappropriate, improper or inadequate.

54. If for any reason the Court should decline to enter this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

**IT IS SO AGREED:**

**MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY**

DATED: 9/30/05 By: Richard H. Oppen  
Richard H. Oppen  
Director

DATED: 9/30/05 By: Cynthia D. Brooks  
Cynthia D. Brooks  
Special Assistant Attorney General

SWANK ENTERPRISES

DATED: 9.30-05 By: Dean Swank  
Dean Swank  
President

DATED: \_\_\_\_\_ By: \_\_\_\_\_  
Jayne Mitchell  
Legal Counsel

IT IS SO ORDERED:

DATED: \_\_\_\_\_  
Jeffrey M. Sherlock  
District Judge

**SWANK ENTERPRISES**

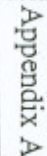
DATED: \_\_\_\_\_ By: \_\_\_\_\_  
Dean Swank  
President

DATED: September 30 2005 By: Jayne Mitchell  
Jayne Mitchell  
Legal Counsel

**IT IS SO ORDERED:**

DATED: \_\_\_\_\_  
Jeffrey M. Sherlock  
District Judge





AREA LAYOUT WITH FORMER AND  
EXISTING MONITORING WELLS  
FOR KALISPELL POLE AND TIMBER SITE  
KALISPELL, MT

## **APPENDIX "B"**

### **NOTICE OF OBLIGATION**

NOTICE IS HEREBY GIVEN that on the 30<sup>th</sup> day of September, 2005, a Consent Decree, of which is this an abstract, was executed by and between SWANK ENTERPRISES and THE MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY providing for certain access rights and other obligations pertaining to the following-described real property in Flathead County, Montana:

A tract, piece or parcel of land, lying and being in the Northwest Quarter of the Northeast Quarter (NW1/4NE1/4), Section Eight (8), Township Twenty-eight (28) North, Range Twenty-one (21) West, P.M.M., Flathead County, Montana, and more particularly described as follows wit: Commencing at the North one quarter corner of Section 8, Township 28 North, Range 21 West, P.M.M., Flathead County, Montana; thence East and along the North boundary line of Section 8, 390.0 feet to a point; thence South 0°10' East, a distance of 20.0 feet to the True Point of Beginning of the tract of land being described; thence South 0°10' East, continuing along same line which is parallel with the mid-section line of Section 8, 325.0 feet to a point on the Northerly R/W of a Great Northern spur line R/W; thence North 74°00' East, and following along said G.N. R/W 136.0 feet to a point which is the beginning of a 7°23' curve; thence along the 7°23' curve, 497.7 feet to a point on the Westerly R/W of the Great Northern main line; thence North 18°21' East, and along the Westerly Great Northern R/W. 25.0 feet to a point on the South boundary of a 20.0 foot county road; thence West and along said county road boundary, 553.2 feet to the Place of Beginning of the tract of land being described.

The original of the Consent Decree is filed under Cause No. BDV-2004-596, Montana First Judicial District Court. The Consent Decree provides to certain persons a right of access to the property for the purposes of performing remedial actions under the Montana Comprehensive Environmental Cleanup and Responsibility Act, Sections 75-10-701 et seq., MCA. The Consent Decree also provides for certain land use restrictions and other "institutional controls" on the property.

The Montana Department of Environmental Quality will provide a full and complete copy of the Consent Decree upon request of any persons.

IN WITNESS WHEREOF, the undersigned have caused this instrument to be executed this \_\_\_\_ day of \_\_\_\_\_, 2005.

SWANK ENTERPRISES

By: \_\_\_\_\_  
Dean Swank  
President



STATE OF MONTANA        )  
                                      : ss.  
County of Flathead        )

On this \_\_\_\_ day of \_\_\_\_\_, 2005, before me, the undersigned, a Notary Public for the State of Montana, personally appeared Dean Swank, known to me to be the person who name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

\_\_\_\_\_  
NOTARY PUBLIC FOR THE STATE OF MT  
Residing at: \_\_\_\_\_  
My Commission Expires: \_\_\_\_\_